

December 17, 2004

CERTIFIED MAIL  
RETURN RECEIPT REQUESTED

Reference No: 04-0126

Mr. Calhoun Moultrie, Jr.  
DBE Liaison Officer  
New Orleans International Airport  
Post Office Box 20007  
New Orleans, LA 70141

Dear Mr. Moultrie:

This is in response to the appeal filed on behalf of Lucien T. Vivien, Jr. and Associates Inc. (Vivien). We have carefully reviewed the material from the New Orleans International Airport (NOIA), as well as information submitted on behalf of Vivien by its attorney and have concluded that the record needs to be developed further before the Department can make a final decision on the appeal.

Specifically, the record reveals that NOIA failed to afford due process to Vivien during its 49 C.F.R. §26.87 ("the Regulation") proceeding. **The Regulation clearly states that proper due process procedures are crucial to maintaining the integrity of the Department's Disadvantaged Business Enterprise (DBE) program.** The Department believes that a fundamental violation occurred with respect to NOIA's handling of this matter.

**1)The Regulations states at §26.87 (b), a recipient must provide the firm with written notice that it finds the firm ineligible, setting forth the specific reasons for this proposed determination and afford the firm an opportunity for an informal hearing at which time it may respond to the reasons given. In such a proceeding, the recipients bear the burden of proving by a preponderance of evidence that the firm does not meet the certification standards pursuant to §26.87 (d) of the Regulation.**

The record reveals that on August 7, 2003, NOIA informed Vivien of its decision to remove its certification as a DBE. Prior to the denial, NOIA failed to notify the firm of its intent to decertify Vivien. This is a violation of the Regulation because the appellant was not afforded due process to present evidence prior to NOIA's decision. Specifically,

NOIA may initiate decertification proceedings in this matter after proper notification is given to the firm as specified under the Regulation §26.87.

The record also reveals that in December of 2002 Vivien was removed from the list of eligible DBE's prior to NOIA's decision to remove its certification and remains off the list of eligible DBEs today.

In addition, the record reveals that during the October of 2003 hearing, NOAB and the DBE Liaison Officer (DBELO) functioned as the DBE Committee. According to the October 15, 2003 transcript Roger Linde, representative for Vivien states, "All I can say is I read the regulations and the way I read the regulations is that we are supposed to get notice with an opportunity for an informal hearing and with reasons. There is supposed to be reasons. Until the board has the informal hearing and makes its determination, we are supposed to stay on the list." The record reveals that Vivien did not receive proper notice, in which, to present information/evidence prior to NOIA's decision to remove the firm's DBE eligibility. This action is contrary to the requirements of §26.87(b) of the Department's Regulation. Moreover, the firm should not have been removed from the list of DBE firms prior to being afforded due process.

**2) The Regulation states at 26.87(h) "Status of firm during proceeding. (1) A firm remains an eligible DBE during the pendency of your proceeding to remove its eligibility. (2) The firm does not become ineligible until the issuance of the notice provided for in paragraph (g) of this section."** We are concerned that Vivien was removed from the list of eligible DBEs prior to being afforded due process and remained off the list prior to NOIA's decision.

Record evidence reveals at the October 15, 2003 hearing Philistine Ferrand, a NOIA official, stated: "What happens in the case of a recertification, the computer system, once your recertification date expires, it automatically takes you off. But, if someone would call and inquire about the company, we would say, we have a recertification application pending. So, they do not remain on the list. There is no way through a computer that we can do that. We can have a company with an expired date on it. They are not recertified until final approval. The letter that we sent them is a proposal to deny recertification, but this is the formal hearing."

Further guidance provided at DOT's Question and Answers about 49 CFR Part 26 (<http://osdbu.dot.gov/business/dbe/dbeqna.cfm>). These questions and answers (Q&A) provide guidance and information for compliance with the provisions under 49 CFR part 26, pertaining to the implementation of the Department's disadvantaged business enterprise program.

The Q&A states under "What Actions Does a Recipient Take After It Request A Currently Certified Firm To Reapply For Certification?" The Answer states: "When a recipient requires a currently certified firm to reapply for certification, the recipient should not treat the firm as though it were a new applicant. That is, while the firm must provide all requested information, the firm does not bear the burden of proving its eligibility, as it would upon initial application...."

The Q&A under "Can A Recipient Remove the Eligibility of A Currently Certified Firm Through Any Means Other Than Those of 26.87?" further states "...When a recipient seeks information from a firm to ensure that it continues to meet Part 26 eligibility criteria or

asks it to reapply for certification, the firm does not automatically lose its eligibility even if it fails to make a timely response. In all these cases, firms continue to be eligible unless and until their eligibility is removed through a 26.87 proceeding (e.g., on the ground of noncooperation), unless the firm states in writing that it no longer chooses to participate in the DBE program."

Since the firm was certified, the NOIA should have initiated a decertification proceeding under §26.87 rather than treat the firm as a new applicant and removed from the list of certified DBEs until such time as it was proven through the proper procedures that the firm was no longer eligible for certification.

**3) The Regulation states at §26.87(e) "*Separation of functions*. You must ensure that the decision in a proceeding to remove a firm's eligibility is made by an office and personnel that did not take part in actions leading to or seeking to implement the proposal to remove the firm's eligibility and are not subject, with respect to the matter, to direction from the office or personnel who did take part in these actions."**

In December 2003 you requested that this office remand the case back to NOIA because the NOAB was currently conducting a second hearing with the firm. At this proceeding NOAB and the DBELO again functioned as the DBE Committee. As a result of this hearing, the Committee issued its decision decertifying Vivien on February 22, 2004. On August 2, 2004, Vivien again filed its appeal of decertification to this office.

The rebuttal letter states (P. 2, ¶ 2) "The first hearing on the DBELO's denial of recertification was scheduled for October 15, 2003. The opening of the hearing on October 15, 2003, the DBELO stated, 'this is the denial of recertification for Lucien T. Vivien, Jr. and Associates...' The NOAB states that 'the Aviation Board as a whole [was] sitting as the DBE Committee under [its] procedures.' The DBELO sat with the NOAB at the October hearing."

According to the record information, the Certification Committee was composed of yourself and individuals employed by NOIA who previously made the decision to decertify Vivien. Since you were involved in the decertification as well as other employees of NOIA, the Committee cannot be considered impartial or disinterested.

It appears that an important facet of the Regulation was overlooked when the committee conducted the hearing with individuals who previously took part in the original denial. Therefore, this arrangement appears to violate the Department's Regulation at 26.87(e).

NOIA violated the foregoing rights, laws and directives when it failed to provide Vivien an impartial review by individuals from an office that did not take part in the proposal to remove Vivien's eligibility. Further, the NOIA did not ensure that there was a separation of functions between the persons removing Vivien's eligibility and those taking part in actions leading up to its actions to decertify the firm. In this instance, Calhoun Moultrie, participated in the October 15, and December 10, 2003 meeting between NOAB officials and Vivien's representatives and questioned the attendees.

Specifically, it appears that the proper application of the provisions of the Regulation was lacking when NOIA failed to provide proper notice to Vivien of the intent to decertify the firm and to provide the firm with an impartial review by individuals that did not take part in the proposal to remove the applicant firm's eligibility.

Regrettably, we must acknowledge that this situation is unique to the regulatory requirements, wherein, the Regulation does not account for cases being remanded twice after a §26.87 proceeding had been conducted. However, this Department must stand firm by its commitment to the Department's "due process" provision.

Therefore, we request that you return Vivien back to the list of certified DBEs until such time as NOIA conducts an impartial hearing in accordance to the Regulation, and substantiates that Vivien is ineligible to participate in the DBE program. To this end, we request that NOIA provide a new decision, if any, within 45 days. We also suggest that NOIA afford Vivien the opportunity to provide a rebuttal and to supplement the records. If NOIA, when preparing for the preliminary review of Vivien determine that the firm meets the eligibility requirements of the regulation that would of course end the matter. If you again conclude that the firm does not meet the eligibility requirements of the regulation, the firm will, of course, have the right to appeal the decision to this office. In that event, the Department will review the complete record and render a final decision.

Thank you for your continued cooperation.

Sincerely,

Joseph E. Austin, Chief  
External Policy & Program Development Division  
Departmental Office of Civil Rights

cc: Erin E. Dearie  
Attorney for Lucien T. Vivien, Jr. and Associates, Inc.